CASE NO. 84-902

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1985

WARDAIR CANADA INC.,

Appellant,

v.

STATE OF FLORIDA
DEPARTMENT OF REVENUE,

Appellee.

ON APPEAL FROM THE
SUPREME COURT OF FLORIDA

BRIEF FOR APPELLEE

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QUESTION PRESENTED

Whether the excise tax imposed by Florida upon the privilege of engaging in the business of selling tangible personal property which includes aviation fuel unconstitutionally impairs the power of the federal government to regulate foreign commerce.

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TABLE OF CITATIONS

Florida Statutes

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STATEMENT OF THE CASE

Appellee has previously set forth the Statement of the Case in its Motion to Dismiss or Affirm on pages 2 through 11 heretofore filed in the instant case.

REFERENCES

The parties are those named in the caption. Reference to the Appellant's brief will be as follows "84-902 A.B.". However, the Solicitor General on behalf of the United States filed an Amicus Curiae Brief in support of Appellant's Jurisdictional Statement (referred to as "84-902 U.S. Br.") and a brief in support of Appellant (referred to as "84-902 U.S.").

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SUMMARY OF ARGUMENT

The tax at issue herein is plainly a sales tax because its legal incidence is upon the seller of the fuel and is imposed on the privilege of selling fuel in Florida. Gaulden v. Kirk, 47 So.2d 567 (Fla. 1950); Delta Air Lines, Inc. v. Department of Revenue, 455 So.2d 317, 321

(Fla. 1984); appeal dismissed, No. 84-929 (Oct. 15, 1985); (See 84-921 A.C. 7).

The Appellant contends that Florida's tax prevents the United States from speaking in "one voice" by "implicating nationally important foreign policy issues", violating a clear "directive" of Congress and with this Court's decision in Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979).

In Japan Line, this Court set forth two additional requirements to the "four-prong" test of Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977). The first was whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation. The second was whether the tax prevents the federal government from "speaking with one voice when regulating commercial relations with foreign governments." The decision of the Florida Supreme Court is consistent with Japan Line and meets both of the additional tests.

It should be pointed out that Appellant's statement that fuel should be likened to the containers involved in Japan Line is incorrect. The containers in Japan Line were, in fact, the instrumentalities used for shipping property into the United States. The containers would be likened to the aircraft themselves and not to the fuel which is consumed by the aircraft in flying into the United States. Thus, Appellant's assertion that the fuel is an instrumentality of commerce is unfounded.

Florida's tax does not cause asymmetry in the international tax structure which operates automatically to foreign nations' disadvantage. Today, as in the past, Florida provides equal and symmetrical treatment of foreign and domestic airlines in the taxation of sales of fuel purchased in Florida.

Appellant errs when saying that the Florida tax "operates automatically to

foreign nations' disadvantage." The tax is clearly neutral in its treatment of foreign airlines. It is therefore consistent with the federal policy of nondiscriminatory treatment of foreign airlines.

Florida's tax is not contrary to an expressed federal policy nor does it impermissibly implicate foreign affairs. The tax does not interfere with the authority of the United States to regulate commercial relations with foreign governments, nor does it violate a clear "directive" of Congress.

Appellant argues that through a clear "directive" from Congress, set forth in 49 U.S.C. §1462 and §1502(b), the power of Florida to impose the excise tax in question has been preempted.

There is nothing in either 49 U.S.C. §1462 or §1502(b) which specifically preempts the field of state excise taxation. Indeed, the contrary is expressed in 49 U.S.C. §1513(b).

It is therefore apparent that, contrary to the Appellant's position, Congress has not preempted the field of state excise taxation. Indeed, Congress specifically reserved this area of the state's primary source of revenue to the state.

As there is no federal preemption applicable here, this Court must analyze the agreement to determine its content and coverage.

In the international compacts (See 84-902, U.S. Br. 10-16), the federal policy expressed is a spirit of equality of opportunity and treatment.

Clearly, in this area, the federal government has spoken with one voice to accomplish equality of treatment.

By the official international compacts, the federal policy expresses a pattern which falls far short of any prohibition upon state taxation of aviation fuel purchased by foreign airlines.

As there is no specific exemption provided in any of the international agreements from state excise taxes, the Florida sales tax imposed under Chapter 212, F.S., as amended, is lawful, permissable and constitutional.

The "one voice" of the Federal Government has spoken, saying that all airlines should be treated equally in every respect and that there should be no discrimination in favor of domestic airlines against foreign airlines. The Florida tax does not violate this federal policy.

ARGUMENT

This case concerns the validity of certain provisions of Chapter 212, Florida Statutes (hereinafter cited as "F.S."), as amended by Chapter 83-3, Laws of Florida, under the Commerce and the Supremacy Clauses of the United States Constitution,

Article I, Section 8, Clause 3, and Article VI, Clause 2, respectively, and the Nonscheduled Air Service Agreement between the United States and Canada of May 8, 1974, TIAS 7826, 25 UST 787.

Chapter 212, F.S., amended by Chapter 83-3, Laws of Florida, is commonly referred to as the "sales tax law of Florida." Chapter 212, F.S., has been construed by the Florida Supreme Court and other Florida appellate courts on numerous occasions as an excise tax levied on the privilege of engaging in certain businesses and transactions as provided in said statute. Gaulden v. Kirk, 47 So.2d 567 (Fla. 1950); Delta Airlines, Inc. v. Department of Revenue, 455 So.2d 317, 321 (Fla. 1984); appeal dismissed, No. 84-929 (Oct. 15th, 1985).

The tax at issue herein is plainly a sales tax because its legal incidence is upon the seller of the fuel and is imposed

for the privilege of selling fuel in Florida. (See 84-921 A.C. 7). Additionally, as this Court recognized in dismissing the appeals by the domestic airlines (See 84-921, 84-926 and 84-929), the tax imposed by Chapter 83-3 meets the four-prong test of Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), reh. den., 430 U.S. 976, and does not violate the Commerce Clause.

The Appellant contends that the decision of the Florida Supreme Court, reported at 455 So.2d 326 (Fla. 1984), JSA at A1-A7, which upholds Florida's excise tax, is inconsistent with federal policy as it relates to the taxation of aviation fuel purchased by foreign airlines in the United States, and with this Court's decision in Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979). Based on those premises, Appellant argues that Florida's tax should be declared unconstitutional as applied.

In Japan Line, this Court set forth two additional requirements to the "four-prong" test of Complete Auto. The first was whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation. The second was whether the tax prevents the federal government from "speaking with one voice when regulating commercial relations with foreign governments." The decision of the Florida Supreme Court is consistent with Japan Line and meets both of the additional tests.

As conceded by Appellant (See 84-902 A.B. 12, n. 7), the "multiple taxation" aspect of Japan Line is not an issue in the instant case. Appellant neither proved nor argued that Florida's sales tax involved in this case "produces multiple taxation in fact" (Japan Line, 441 U.S. at 452). Additionally, Florida's sales tax does not "create a substantial risk of international

multiple taxation" (Id. at 451) (See 84-902 U.S. Br. 30-31). The decision of the Florida Supreme Court is consistent with these observations.

Nevertheless, Appellant suggests that Florida's excise tax prevents the United States from speaking with "one voice" by "implicating nationally important foreign policy issues," violating a clear "directive" of Congress, and failing to meet the second test in Japan Line, and thus is unconstitutional as applied.

I

First, it should be pointed out that Appellant's statement that fuel should be likened to the containers involved in Japan Line is incorrect. The containers in Japan Line were, in fact, the instrumentalities used for shipping property into the United States. The containers would be likened to the aircraft themselves and not to the fuel

which is consumed by the aircraft in flying into the United States. Thus, Appellant's assertion that the fuel is an instrumentality of commerce is unfounded. Furthermore, Appellant inaccurately states that Florida imposes a tax on aviation fuel. This is not true. Florida's tax is an excise tax imposed upon the privilege of engaging in the business of selling tangible personal property including fuel. (See 84-921 U.S. Br. 7). The excise tax is imposed on the vendor or dealer and is a privilege tax not a property tax as suggested by Appellant. The tax addressed by this Court in Japan Line was a property tax. Florida's excise tax is on the privilege of engaging in business and therefore is totally dissimilar from the ad valorem property tax imposed on the property itself (the containers), in Japan Line.

II

Contrary to Appellant's contention, Florida's tax does not cause asymmetry in the international tax structure which operates automatically to foreign nations' disadvantage. Appellant leaves the impression that, prior to 1983, Florida granted foreign airlines a proration of the tax which was not granted to domestic airlines in international commerce. In fact, at that time both foreign and domestic airlines, operating over international routes, and traveling only briefly in Florida's airspace, were granted the proration on a mileage basis. With the abolition of the proration of the tax, foreign and domestic airlines continue to to be treated equally by Florida. Today, as in the past, Florida provides equal and symmetrical treatment of foreign and domestic airlines in the taxation of sales of fuel purchased in Florida.

Appellant errs when saying that the Florida tax "operates automatically to foreign nations' disadvantage." This is a pure sales tax imposed upon the privilege of engaging in the business of selling tangible personal property which includes aviation fuel, irrespective of its use, whether in domestic or foreign commerce. The incident upon which the tax is imposed occurs prior to any commitment of the aviation fuel to any commerce, foreign or domestic. The tax is clearly neutral in its treatment of foreign airlines. It is therefore consistent with the federal policy of nondiscriminatory treatment of foreign airlines.

III

Florida's tax is not contrary to an expressed federal policy nor does it impermissibly implicate foreign affairs.

In analyzing this excise tax's impact on foreign affairs, an examination must be made of the "one voice" doctrine. Florida contends that its tax does not interfere with the authority of the United States to regulate commercial relations with foreign governments, nor does it violate a clear "directive" of Congress.

The issue raised by the Appellant that Florida's tax violates a clear "directive" of Congress must be disposed of before analyzing the "one voice" of the federal government as expressed in the agreement between the United States and Canada.

Appellant argues that through a clear "directive" from Congress, set forth in 49 U.S.C. §1462 and §1502(b), the power of Florida to impose the excise tax in question has been preempted.

Appellant asserts that the Federal Aviation Act and specifically 49 U.S.C.

§1462 and §1502(b) is a clear "directive" of Congress prohibiting the excise tax involved here. The Federal Aviation Act has among its purposes the promotion and regulation of competition in the air transportation industry, promotion of air safety and prevention of aviation accidents. See 49 U.S.C. §1302 and §1303.

Congress has directed "[t]he Secretary of State [to] advise the Secretary of Transportation . . . concerning the negotiation of any agreement with foreign governments for the establishment or development of air navigation, including air routes and services" (49 U.S.C. App. §1462). "In formulating the United States international air transportation policy," Congress has provided that the Secretary of State, in consultation with the Secretary of Transportation, "shall develop a

negotiating policy which emphasizes the greatest degree of competition that is compatible with a well-functioning international air transportation system" (49 U.S.C. App. §1502(b)). (See 84-902 U.S. 1,2) (e.s.)

It is under the authority of 49 U.S.C. §1462 and §1502(b) that the International Bilateral Agreement of the U.S./Canada Nonscheduled Air Services Agreement (TIAS 7826) was entered into, however, the areas to be covered by the agreement are those areas set forth in 49 U.S.C. §1502(b).[1]

There is nothing in either 49 U.S.C. §1462 or §1502(b) which specifically preempts the field of state excise taxation. Indeed, the contrary is

[1]There are many international bilateral agreements with objects similar to those of the U.S./Canada Nonscheduled Air Service Agreements. These agreements cover the countries from which the other foreign airline amici operate. (See 84-902 U.S. Br. 10-17.)

expressed in 49 U.S.C. §1513. In §1513(a), Congress has provided a prohibition on certain state taxes as they apply to air transportation. Section 1513(a) is not applicable here. Further, as this Court stated in Aloha Airlines v. Director of Taxation of Hawaii, 464 U.S. 7, 104 S.Ct. 291, 294, n. 6 (1983), in §1513(b) Congress has reserved:

> . . . [t]he States' primary sources of revenue, such as property taxes, net income taxes, franchise taxes, and sales or use taxes. (citation omitted). We find no paradox between §1513(a) and §1513(b). [Section] 1513(a) preempts a limited number of state taxes, including gross receipts taxes imposed on the sale of air transportation or the carriage of persons traveling in air commerce. §1513(b) clarifies Congress's view that the States are still free to impose on airlines and air carriers "taxes other than those enumerated in subsection (a)", such as property taxes, net income taxes, and franchise taxes. While neither the statute nor its legislative history explains exactly why Congress chose to distinguish between gross receipts taxes imposed on airlines and the taxes reserved in §1513(b), the statute is quite

> clear that Congress chose to make the distinction, and the courts are obliged to honor this congressional choice." (e.s.).

It is therefore apparent that, contrary to the Appellant's position, Congress has not preempted the field of state excise taxation. Indeed Congress specifically reserved this area of the state's primary source of revenue to the state.

As there is no federal preemption applicable here, this Court must analyze the agreement to determine its content and coverage. In other words what is the "one voice" which is speaking in the U.S./Canada Nonscheduled Air Service Agreement and the other international bilateral agreements upon which the various amici are claiming an exemption from the Florida sales tax.

In the international compacts (See 84-902, U.S. Br. 10-16), the federal policy expressed is a spirit of equality of

opportunity and treatment. The ICAO's Resolution (See 84-902 U.S. Br. 11), passed under the Chicago Convention on International Civil Aviation, implements the Convention's purpose: to avoid discrimination against airlines among contracting nations. The Convention (See 84-902 U.S. Br. 10), exempts only aviation fuel and supplies which are "on board an aircraft."

Clearly, in this area, the federal government has spoken with one voice to accomplish equality of treatment. While the international compacts "differ in subtle ways" (84-902 U.S. Br. 34), it can be stated without equivocation that the agreements do not explicitly interdict or preempt state taxes, such as the Florida tax involved in the instant case. (84-902 U.S. Br. 17).

By the official international compacts, the federal policy expresses a pattern which falls far short of any prohibition upon state taxation of aviation fuel purchased by foreign airlines. Thus it appears the only final federal pronouncement on the "exemption" Appellant urges is an exemption from national duties and national excise taxes. Accordingly, by application of the well recognized rule of expressio unius est exclusio alterius no exemption from state excise tax can be held to exist by virtue of these agreements.

As Appellant has stated, the policy of the Federal Government through its bi-lateral air transport agreements is exemplified by the Nonscheduled Air Service Agreement between the United States and Canada. (84-902 A.B. 28)

The agreement between the United States and Canada, upon which Appellant relies, provides in part:

> 2. Neither Contracting Party shall give a preference to its own carriers over the carriers of the other Contracting Party in the application of its customs, immigration, quarantine, and similar regulations or in the use of airports, airways, and other facilities under its control.
>
> . . .
>
> Neither Contracting Party shall discriminate against a carrier or among carriers of the other Contracting Party providing the services covered by this Agreement.

Nonscheduled Air Service Agreement, U.S. - Canada, Articles XIII and XIV, TIAS 7826. (J.S.A. at A-59).

Article XII of said agreement provides:

> Each Contracting Party shall exempt the carriers of the other Contracting Party to the fullest extent possible under its national law from import restrictions, customs duties, excise taxes, inspection fees, and other national duties and charges on fuels, lubricants, consumable technical supplies . . .
>
> Nonscheduled Air Service Agreement, U.S. - Canada, Article II, Paragraph 1, TIAS 7826. (J.S.A. at A-58). (e.s.)

The Executive Branch of the Federal Government has spoken only to national taxes. Article XII of the Agreement only speaks to national duties and charges on fuel. The agreement is silent on the subject of state excise taxes, no doubt recognizing the state's sovereign power to tax. Therefore, the agreement does not preempt the state's taxing power. It is apparent from the amici briefs filed by the other foreign airlines that all these agreements fall far short of declaring a national policy of preemption because the agreements speak only to the United States Government using its best efforts to secure an exemption from state taxation.

The language of a treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them. Guarantee Trust Co. v. United States, 304 U.S. 126 (1938).

The Florida Supreme Court recognized that the provision in the agreement dealing with duties and excise taxes applied only to national customs duties, excise taxes and charges, and further recognized that the purpose of the agreement was to preserve and promote the continued development of a system of air transport free from discriminatory practices and to support equal commercial opportunity between the nations. Relying on this Court's decision in Pennsylvania v Nelson, 350 U.S. 497 (1956), the Florida Supreme Court applied the three-prong test to determine the supremacy of a federal regulatory scheme over the state regulation in the same or similar area. Thus, the Florida Supreme Court's decision is consistent with (1) the language of the various agreements themselves, and (2) this Court's application of the three-prong test in Nelson.

The Appellant is apparently requesting this Court to ignore the international compact and the expressed federal policy contained therein. Further, they seek to have this Court amend or rewrite these agreements to include an exemption from state excise taxes. Florida contends that Appellant and Amici are bound by these agreements which should not be subject to judicial renegotiation.

As there is no specific exemption provided in any of the international agreements from state excise taxes, the Florida sales tax imposed under Chapter 212, F.S., as amended, is lawful, permissable and constitutional.

One method of ascertaining the meaning given to the agreement is to see how the agreement is being implemented by the contracting parties. As the Solicitor General stated in his brief at page 4, "while the United States airlines, through

bilateral executive agreements, are exempt from taxes imposed by the Canadian National authorities on fuel purchased in Canada, Canada's provincial governments also 'impose taxes on aviation fuel and, like Florida, [they] generally do not grant an exemption for fuel purchased by foreign airlines for use in foreign commerce'. (U.S. Br. 13) . . . Ten Canadian provincial governments currently impose taxes on the sale of aviation fuel. In their structure and incidence, these taxes are similar to the challenged Florida tax." (See 84-902 U.S. 4-5).

It is of note that the Appellant did not address the manner in which its home country has interpreted the very agreement which is before this Court. This interpretation by Canada is just another indication that Appellant's "policy argument" for a tax exemption from state excise taxes is not contained within the

"one voice" of the federal government as expressed in the bilateral agreement. When such "policy arguments" are directed to this Court however, they "are directed to the wrong forum" (Japan Line, 441 U.S. at 456, 457).

The "one voice" of the Federal Government has spoken, saying that all airlines should be treated equally in every respect and that there should be no discrimination in favor of domestic airlines against foreign airlines. The Florida tax does not violate this federal policy. The outcome of this case should indeed be dictated by this federal policy as enunciated in the particular compacts. The Compacts in their "idiosyncratic provisions" have set forth a federal policy which places no restrictions on a state's power to impose a nondiscriminatory excise tax, such as Florida's, upon the privilege of engaging in the business of selling

tangible personal property, such as aviation fuel. The Florida tax is certainly consistent with equality of treatment and it is consistent with federal policy as expressed in the international compacts.

CONCLUSION

Accordingly, the decision of the Florida Supreme Court should be affirmed.

Respectfully submitted,

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